RAPE — INTERCOURSE WITH WIFE UNDER AGE OF CONSENT. — Defendant contracted a common-law marriage with A, a female under the age of sixteen. A statute set the age of consent to marriage at sixteen for females. (1915 MICHIGAN COMPILED LAWS, § 11362.) Defendant was convicted of statutory rape on A, under a statute providing for the punishment of any person who shall ". . . unlawfully and carnally know and abuse any female under the full age of sixteen years." (1915 MICHIGAN COMPILED LAWS, § 15211.) He brings exceptions. *Held*, that the conviction be reversed and defendant discharged. *People* v. *Pizzura*, 178 N. W. 235 (Mich.).

Common-law marriages are valid in most jurisdictions in the United States, including Michigan. *Meister* v. *Moore*, 96 U. S. 76. *Peet* v. *Peet*, 52 Mich. 464, 18 N. W. 220. Where one party is under the age of consent, a marriage is voidable, but until avoided it is valid. *People* v. *Slack*, 15 Mich. 193; *State ex rel. Scott* v. *Lowell*, 78 Minn. 166, 80 N. W. 877; *Beggs* v. *State*, 55 Ala. 108. *Contra*, *Shafher* v. *State*, 20 Ohio 1. At the time of the intercourse, therefore, A was defendant's wife. It is universally held that a man cannot commit rape on his own wife. *Frazier* v. *State*, 48 Tex. Cr. 142, 86 S. W. 754. The reasoning usually adopted is that a wife gives irrevocable consent to intercourse. See 1 HALE P. C. 629. It is on this reasoning that the court in the principal case chiefly relies. But such an explanation is inadequate in this case, for under the statute consent of a female under sixteen is not a defense. *People* v. *Smith*, 122 Mich. 284, 81 N. W. 107. The result of the case is properly reached by statutory construction. The word "unlawfully" in a similar statute has been held to exclude intercourse between husband and wife. *Plunkett* v. *State*, 72 Ark. 409, 82 S. W. 845. Another court has given the same effect to the word "abuse." *State* v. *Rollins*, 80 Minn. 216, 83 N. W. 141. At all events, it is clear that the legislature did not intend to make criminal the intercourse to which a husband is entitled by the marital relation. See TIFFANY, LAW OF PERSONS AND DOMESTIC RELATIONS, § 31.

SALES — IMPLIED WARRANTIES — LIABILITY OF MUNICIPALITY FOR FURNISHING IMPURE WATER. — The defendant city supplied the plaintiff with water. The plaintiff contracted typhoid fever through the use of this water. He sued the city, alleging the breach of an implied warranty that the water was wholesome. The city demurred. *Held*, that the demurrer be sustained. *Canavan* v. *City of Mechanicville*, 180 N. Y. Supp. 62 (App. Div.).

One ground of decision given by the court was that there was no sale of the water. This seems erroneous. Water confined in pipes is personal property. *Clark* v. *State*, 14 Okla. Crim. 284, 170 Pac. 275; *Bear Lake Waterworks Co.* v. *Ogden City*, 8 Utah, 494, 33 Pac. 135; *City of Milwaukee* v. *Zoehrlaut Leather Co.*, 114 Wis. 276, 90 N. W. 187. See 1 WIEL, WATER RIGHTS IN THE WESTERN STATES, 3 ed., § 35. When such water is supplied to a consumer for a price, there is a sale. *People ex rel. Heyneman* v. *Blake*, 19 Cal. 579; *Jersey City* v. *Harrison*, 71 N. J. L. 69; 72 N. J. L. 185; 58 Atl. 100. See also *Wagner* v. *City of Rock Island*, 146 Ill. 139, 34 N. E. 545. Thus the city seems clearly to have been a dealer in water. At common law, a dealer in provisions for immediate use impliedly warrants them to be wholesome. *Hoover* v. *Peters*, 18 Mich. 51; *Race* v. *Krum*, 222 N. Y. 410, 118 N. E. 853. See WILLISTON, SALES, § 242. See also 32 HARV. L. REV. 71. It is held in New York this rule is not changed by the Sales Act. *Rinaldi* v. *Mohican Co.*, 225 N. Y. 70, 121 N. E. 471. The city, while not a dealer in provisions in the strict sense of the term, was a dealer in an article to be used for human consumption, and should, it would seem, come under the rule. Nor should the fact that the dealer was a municipal corporation affect the result. The operation of waterworks is not a governmental function, and subjects the municipality to the same liability as a private company. *Keever* v. *City of Mankato*, 113 Minn.

55, 129 N. W. 158. See *Western Savings Fund Society* v. *City of Philadelphia*, 31 Pa. 175, 183. It is generally said, however, that a water company, whether municipal or private, is liable for furnishing unwholesome water only on proof of negligence. See *Green* v. *Ashland Water Co.*, 101 Wis. 258, 263; 77 N. W. 722, 724; *Hayes* v. *Torrington Water Co.*, 88 Conn. 609, 612, 92 Atl. 406, 407. See also 3 DILLON, MUNICIPAL CORPORATIONS, 5 ed., § 1316.

STARE DECISIS — THE EXTENT OF THE DOCTRINE. — The plaintiff was injured in an accident caused by a defective wheel on an automobile, manufactured by the defendant, but purchased from a retail dealer. A judgment for the plaintiff in the District Court was reversed at a prior hearing before the Circuit Court on the ground that no right of action existed although the defendant was negligent. The plaintiff now brings error to the Circuit Court from a judgment for the defendant. *Held*, that a cause of action does exist. *Johnson* v. *Cadillac Motor Car Co.*, 261 Fed. 878 (C. C. A.), reversing 221 Fed. 801.

Proceedings were instituted to disbar an attorney under a California statute (1916 FAIRALL'S CODE CIV. PROC., §§ 287, 288, 289). A certain construction had been given to these sections by a series of decisions extending over a period of thirty-five years. *Held*, that this construction can be changed only by the legislature. *In re Riccardi*, 189 Pac. 694 (Cal.).

For a discussion of these cases, see NOTES, p. 74, *supra*.

STATUTE OF FRAUDS — ORAL WAIVER OF CONDITION IN WRITTEN CONTRACT. — The plaintiff and the defendant drew up a written contract for the exchange of land free from any incumbrances. Subsequently, and prior to the date when performance was due, the parties orally agreed upon the substitution of a deposit of money for the removal of any incumbrances. In reliance upon that understanding, the plaintiff allowed an incumbrance to remain on his property on the date when performance was due. The defendant refused to perform. Plaintiff sues for breach of contract and defendant sets up the Statute of Frauds. *Held*, that the plaintiff can recover. *Imperator Realty Co.* v. *Tull*, 127 N. E. 263 (N. Y.).

A defendant, who prevents or hinders the performance of an obligation upon which his liability depends, is precluded from interposing such non-performance as a defense to an action on the contract. *United States* v. *Peck*, 102 U. S. 64; *Patterson* v. *Meyerhofer*, 204 N. Y. 96, 97 N. E. 472. The plaintiff's excuse for non-performance is equally effective when he relies on the defendant's sanction to dispense with such performance. *Hirsch Rolling Mill Co.* v. *Milwaukee & Fox River Valley Ry. Co.*, 165 Wis. 220, 161 N. W. 741; *Neppach* v. *Oregon & C. R. Co.*, 46 Ore. 374, 80 Pac. 482. However, it is essential that the plaintiff could and would have performed the condition, had it not been for the permission of the defendant. *McCalley* v. *Otey*, 99 Ala. 584, 12 So. 406; *Shank* v. *Groff*, 45 W. Va. 543, 32 S. E. 248. The plaintiff is excused because it is unjust that the defendant take advantage of the failure which he himself caused. Therefore, an oral waiver of a condition in a written contract within the Statute of Frauds should also excuse the plaintiff's non-performance. *Scheerschmidt* v. *Smith*, 74 Minn. 224, 77 N. W. 34; *Hirsch Rolling Mill Co.* v. *Milwaukee & Fox River Valley Ry. Co.*, *supra*. The Statute of Frauds is satisfied because the action is on the written contract. The oral understanding is introduced only to excuse the plaintiff's non-performance of a condition. *Cf. Rosenfeld* v. *Standard Bottling & Extracts Co.*, 232 Mass. 239, 122 N. E. 299.

STATUTES — IMPEACHMENT OF STATUTES — ADMISSIBILITY OF HOUSE JOURNALS. The constitution of Georgia provides: "No bill or resolution ap-